Small Medium Enterprise Development Bank Malaysia Bhd (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Klinik Pakar Wanita Dr Nora Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-375–09 OF 2017
WONG CHEE LIN JC
3 APRIL 2018

Civil Procedure — Summary judgment — Action to recover monies loaned — Defendants failed to pay outstanding sum based on loan facility granted by plaintiff — Plaintiff filed summary judgment under O 14 of the Rules of Court 2012 — Defendants raised preliminary issue — Whether plaintiff complied with threshold requirements for O 14 application — Whether there was triable issue raised — Whether plaintiff breached duty of care — Whether plaintiff entitled to imposed compound interest and/or penalty charges — Whether plaintiff should inform court on current status of properties held by plaintiff as securities for loan — Whether there was cause of action deposed against second and third defendants — Rules of Court 2012 O 14

The plaintiff had granted a loan facility for a sum of RM3,870,000 to the first defendant pursuant to a letter of offer and a facility agreement. The facility was guaranteed by the second and third defendants and was secured by three deeds of assignment over certain offices executed by the defendants in favour of the plaintiff. The defendants had failed to pay the loan installments and consequently, the plaintiff demanded the outstanding sum of RM4,825,900.63 as at 22 August 2017 together with interest and late payment interest. As the defendants failed to make payment, the plaintiff brought the present action for summary judgment under O 14 of the Rules of Court 2012 ('the ROC'). The defendant raised a preliminary issue that the plaintiff did not meet the threshold requirements for an O 14 application. The defendants submitted that the plaintiff did not comply with O 14 r 2 of the ROC and did not verify the cause of action as required. The triable issues raised by the defendants were: (a) the plaintiff had breached its duty of care to the defendants ('the first issue') — in respect of this issues, the defendants contended that: (i) there was doubt as to what the true nature of the loan granted to the first defendant because the plaintiff in its affidavit in support had referred to a fixed assets loan whereas the facility agreement exhibited only identified it as a loan facility; (ii) the plaintiff had failed to furnish the statement of account regularly to the defendants despite the defendants' request; and (iii) the defendants were blacklisted by the plaintiff without justification; (b) the plaintiff had

wrongfully and illegally imposed compound interest and/or penalty charges which the plaintiff was not entitled to do under the facility agreement ('the second issue'); (c) the plaintiff had failed to disclose to the court as to the current status of the properties under the deeds of assignment and whether strata titles had been issued ('the third issue'); and (d) there was no cause of action deposed as against the second and third defendants in the plaintiff's affidavits ('the fourth issue').

Held, allowing the plaintiff's application with costs of RM5,000 subject to allocator:

(1) There was no substance in the preliminary issue raised by the defendants. Paragraph 5 of the affidavit in support affirmed by the plaintiff's vice president stated that the plaintiff's claim against the defendants was in connection with the default of the first defendant in the repayment of a fixed asset loan in accordance with the securities executed by the first defendant and pursuant to a guarantee executed by the second and third defendants. Based on the above, the plaintiff had complied with O 14 r 2 of the ROC and had duly verified its cause of action against the defendants. Therefore, the burden was on the defendants to raise a triable issue (see paras 20–22).

(2) The court held that the first issue was not a triable issue. This was based on the court's findings that: (a) the plaintiff was not wrong to refer to the facility as a fixed assets loan because in the schedule to the facility agreement, the loan facility amount was stated as 'Loan Facility for Fixed Assets in the sum of RM3,870,000 only ...'; (b) the plaintiff had provided statements of account whenever requested by the first defendant; and (c) as there was no reply to the plaintiff's affidavit by the defendants, as such, it was deemed that the defendants had accepted the response by the plaintiff that the plaintiff as a financial institution involved in the system of CCRIS reporting was subject to the guidelines issued by Bank Negara Malaysia ('BNM') and was obliged to report the information to BNM (see paras 25, 27 & 32–33).

(3) The second issue was without substance. Section 4.05 of the facility agreement provided for the capitalisation of interest which entitled the plaintiff to charge compound interest. Further, Section 4.06 of the facility agreement allowed the plaintiff to charge interest at a rate which was 1% higher than the prescribed rate if the borrower shall default in the payment on the due date of any one or more of the installments. As such, the allegation that the plaintiff was not entitled to charge interest was without basis (see para 35).

(4) The third issue was not a triable issue. The deeds of assignment were only relevant insofar as they should be mentioned as the security for the loan granted to the first defendant. Whether strata titles have been issued or

not had nothing to do with the indebtedness of the defendants to the plaintiff in respect of the loan facility (see para 38).

(5) The court found that the fourth issue was without basis. The plaintiff had deposed that the loan to the first defendant was secured inter alia by the guarantee executed by the second and third defendants. The guarantee was exhibited, and the plaintiff had in its affidavit in reply set out terms of the guarantee and the second and third defendants' liability thereunder. Both the facility agreement and the guarantee contained clauses to the effect that a statement of account signed by an officer of the plaintiff showing the indebtedness of the first defendant shall be conclusive and binding on the defendants as to any amount due to the plaintiff. In the present case, the plaintiff had exhibited the signed statement of account showing the indebtedness of the first defendant as at 22 August 2017 (see paras 40–42).

[Bahasa Malaysia summary

Plaintif telah memberikan kemudahan pinjaman untuk sejumlah RM3,870,000 kepada defendan pertama berikutan surat tawaran dan perjanjian kemudahan. Kemudahan tersebut dijamin oleh defendan kedua dan ketiga dan mendapat kontrak tersebut dengan tiga surat ikatan penyerahhakan ke atas pejabat-pejabat tertentu yang dilaksanakan oleh defendan-defendan dan memihak plaintif. Defendan-defendan telah gagal untuk membayar ansuran pinjaman dan akhirnya, plaintif menuntut jumlah tertunggak sebanyak RM4,825,900.63 seperti pada 22 Ogos 2017 bersama dengan faedah dan faedah bayaran lewat. Memandangkan defendan-defendan gagal untuk membuat bayaran, plaintif membawa tindakan ini untuk penghakiman ringkas di bawah A 14 Kaedah-Kaedah Mahkamah 2012 ('the KKM'). Defendan membangkitkan isu awalan bahawa plaintif tidak memenuhi keperluan ambang untuk permohonan A 14. Defendan-defendan berhujah bahawa plaintif tidak mematuhi A 14 k 2 KKM dan tidak mengesahkan kausa tindakan seperti yang diperlukan. Isu yang boleh dibicarakan dibangkitkan oleh defendan-defendan adalah: (a) plaintif telah memungkiri kewajipan berhati-hatinya kepada defendan-defendan ('isu pertama') — berkaitan isu ini, defendan-defendan berhujah bahawa: (i) terdapat keraguan terhadap apakah sifat sebenarnya pinjaman yang diberikan kepada defendan pertama kerana plaintif dalam afidavit sokongannya telah merujuk kepada pinjaman aset tetap sementara perjanjian kemudahan yang dilampirkan hanya mengenalpastinya sebagai kemudahan pinjaman; (ii) plaintif telah gagal untuk mengemukakan penyata akaun dengan tetap kepada defendan-defendan meskipun terdapat permintaan daripada defendan-defendan; dan (iii) defendan-defendan disenaraihitamkan oleh plaintif tanpa justifikasi; (b) plaintif telah secara salah dan salah dari segi undang-undang dengan mengenakan faedah kompaun dan/atau caj penalti yang mana plaintif tidak berhak untuk melakukannya di bawah perjanjian kemudahan ('isu kedua'); (c) plaintif telah gagal untuk

mendedahkan kepada mahkamah mengenai status semasa hartanah di bawah surat ikatan penyerahhakan dan sama ada hakmilik strata telah dikeluarkan ('isu ketiga'); dan (d) tidak terdapat kausa tindakan yang dideposkan terhadap defendan kedua dan ketiga dalam afidavit-afidavit plaintif ('isu keempat').

Diputuskan, membenarkan permohonan plaintif dengan kos sebanyak RM5,000 tertakluk kepada alukator:

(1) Tidak terdapat kebenaran dalam isu awalan yang dibangkitkan oleh defendan-defendan. Perenggan 5 afidavit sokongan yang disahkan oleh naib presiden plaintif menyatakan bahawa dakwaan plaintif terhadap defendan-defendan adalah berkaitan keingkaran defendan pertama dalam pembayaran balik pinjaman aset tetap mengikut sekuriti-sekuriti yang dilaksanakan oleh defendan kedua dan ketiga. Berdasarkan di atas, plaintif telah mematuhi A 14 k 2 KKM dan telah dengan wajar mengesahkan kausa tindakannya terhadap defendan-defendan. Oleh itu, beban adalah ke atas defendan-defendan untuk membangkitkan isu yang boleh dibicarakan (lihat perenggan 20–22).

(2) Mahkamah memutuskan bahawa isu pertama bukan isu yang boleh dibicarakan. Ini adalah berdasarkan ke atas dapatan mahkamah bahawa: (a) plaintif tidak salah untuk merujuk kepada kemudahan sebagai pinjaman aset tetap kerana dalam jadual kepada perjanjian kemudahan, jumlah kemudahan pinjaman dinyatakan sebagai 'Loan Facility for Fixed Assets in the sum of RM3,870,000 only ...'; (b) plaintif telah memberikan penyata akaun pada bila-bila masa diminta oleh defendan pertama; dan (c) memandangkan tidak terdapat jawapan kepada afidavit plaintif oleh defendan-defendan, dengan itu, ia dianggap bahawa defendan-defendan telah menerima jawapan plainitf bahawa plaintif sebagai institusi kewangan terlibat dalam sistem laporan CCRIS tertakluk kepada garis panduan yang dikeluarkan oleh Bank Negara Malaysia ('BNM') dan bertanggungjawab untuk melaporkan maklumat tersebut kepada BNM (lihat perenggan 25, 27 & 32–33).

(3) Isu kedua adalah tanpa kebenaran. Seksyen 4.05 perjanjian kemudahan memperuntukkan untuk pemodalan faedah yang membuatkan plaintif berhak kepada caj faedah kompaun. Selanjutnya, seksyen 4.06 perjanjian kemudahan membenarkan plaintif kepada caj faedah pada kadar yang mana adalah 1% lebih tinggi daripada kadar ditetapkan jika peminjam mengingkari bayaran pada tarikh kena bayar terhadap mana-mana satu atau lebih bayaran ansuran tersebut. Dengan itu, dakwaan bahawa plaintif tidak berhak kepada caj faedah adalah tidak berasas (lihat perenggan 35).

(4) Isu ketiga bukan isu yang boleh dibicarakan. Surat ikatan penyerahhakan hanya relevan setakat ia patut disebut sebagai sekuriti bagi pinjaman yang diberikan kepada defendan pertama. Sama ada hakmilik strata yang telah

dikeluarkan atau tidak, tidak kena mengena dengan hutang defendan-defendan kepada plaintif berkaitan kemudahan pinjaman (lihat perenggan 38).

(5) Mahkamah mendapati bahawa isu keempat adalah tidak berasas. Plaintif telah memberi keterangan bahawa pinjaman kepada defendan pertama tersebut dijamin, antara lain, oleh jaminan yang dilaksanakan oleh defendan kedua dan ketiga. Jaminan tersebut dilampirkan, dan plaintif dalam afidavit jawapannya menetapkan terma-terma jaminan dan liabiliti defendan kedua dan ketiga di bawahnya. Kedua-dua perjanjian kemudahan dan jaminan yang mengandungi klausa-klausa yang bermaksud penyata akaun yang ditandatangani oleh pegawai plaintif menunjukkan keberhutangan defendan pertama akan menjadi muktamad dan mengikat ke atas defendan-defendan terhadap apa-apa jumlah yang kena bayar kepada plaintif. Dalam kes ini, plaintif telah melampirkan penyata akaun yang ditandatangani menunjukkan keberhutangan defendan pertama pada 22 Ogos 2017 (lihat perenggan 40–42).]

Notes

For cases on action to recover monies loaned, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9616–9622.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd [1969] 2 MLJ 98 (refd)
Murphy v Nolan [1886] 18 LR Ir 468 (refd)
National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, SC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Supreme Leasing Sdn Bhd v Dior Enterprise & Ors [1990] 2 MLJ 36, HC (refd)

Legislation referred to

National Land Code
Rules of Court 2012 O 14, O 14 rr 2, 3

R Subashini a/p Ramakrishnan (Ganesan & Irmohizam) for the plaintiff.
Prakash Lachimanan (Krish Maniam & Co) for the defendants.

Wong Chee Lin JC:

[1] This case concerns an application by the plaintiff bank for summary judgment against the defendants, as documented in encl 8. I allowed the plaintiff's application on 10 May 2018. These are the full reasons for my decision.

SALIENT BACKGROUND FACTS

[2] The plaintiff granted a loan facility for a sum of RM3,870,000 to the first defendant pursuant to a letter of offer dated 25 August 2006 and a facilities agreement dated 14 December 2006.

[3] The facility was guaranteed by the second and third defendants.

[4] The facility was also secured by three deeds of assignment over certain offices executed by the defendants in favour of the plaintiff.

[5] Vide a letter of restructuring dated 26 August 2009, the facility was restructured subject to the terms and conditions therein stated.

[6] Vide a letter of restructuring dated 20 June 2011, the facility was again restructured subject to the terms and conditions therein stated.

[7] Subsequently, vide a letter of restructuring dated 21 November 2014, the facility was rescheduled subject to the terms and conditions stated therein.

[8] The first defendant by way of its letter dated 3 December 2015 admitted to the plaintiff that its hospital project was halted as a result of change in board of directors at its joint venture partner company Healthscope. According to the first defendant, the new board has expressed hesitation to continue with the project given current economic conditions.

[9] The first defendant refused to pay further loan instalments after a while and the plaintiff caused letters of demand dated 23 August 2017 to be issued against the defendants demanding the total outstanding sum of RM4,825,900.63 as at 22 August 2017 together with interest and late payment interest thereon.

[10] The defendants did not make payment as a result of which the claim in court was filed by the plaintiff and the plaintiff filed the application for summary judgment.

ANALYSIS AND FINDINGS

The law

[11] This is an application for summary judgment under O 14 of the Rules of Court 2012 ('the ROC 2012'). It is established law that once an O 14 application is demonstrated to be properly filed, the burden shifts and rests on the defendant who seeks to resist the application to raise a defence which shows a ' bona fide triable issue', in the sense of an issue which justifies and warrants the matter to be considered at a full trial.

[12] This is in keeping with the requirements of O 14 r 3 of the ROC 2012 which provides that unless the defendant satisfies the court with respect to the claim, or part of a claim, to which the application relates that:

(a) there is an issue or question in dispute which ought to be tried; or

(b) there ought for some other reason to be a trial of that claim or part thereof.

[13] The court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

[14] In the often quoted decision of the former Supreme Court in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 it was authoritatively ruled as follows:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of Order 14.
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> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

[15] I would also like to refer to the leading judgment of the former Supreme

Court on summary judgment applications in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 which held as follows:

> In an application under O 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue. Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.

[16] The issues raised by the defendants are considered below.

[17] The defendants raised a preliminary issue. It is that the plaintiff did not even meet the threshold requirements for an O 14 application. The defendants allege that the plaintiff did not comply with O 14 r 2 of the Rules of Court 2012 ('the ROC') and did not verify the cause of action as required.

[18] The defendants relied on the case of *Supreme Leasing Sdn Bhd v Dior Enterprise & Ors* [1990] 2 MLJ 36 which referred to the old Irish case of *Murphy v Nolan* [1886] 18 LR Ir 468 where Lord Ashborne said at p 470:

> Now, there is no question that the affidavit in support of a motion for judgment must do two things: (1) verify the cause of action and (2) state that the defendant has no defence. The contention here is that the cause of action was not sufficiently verified. The way the cause of action was verified was this:
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> > The defendant herein is indebted to me in the sum of $ 24.16s as per particulars specially endorsed on the writ of summons herein.

[19] In that case, the plaintiff's application was held defective and ought to be dismissed outright.

[20] There is no substance in this issue raised by the defendants. I have reviewed the affidavit in support affirmed by the plaintiff's vice president. In para 5, it was stated that the plaintiff's claim against the defendants was in connection with the default of the first defendant in the repayment of a fixed asset loan in accordance with the securities executed by the first defendant and pursuant to a guarantee executed by the second and third defendants.

[21] Copies of the letter of offer and the facilities agreement, the guarantee and the various deeds of assignment were exhibited. The plaintiff then went on to refer to and exhibit the various restructuring agreements entered into between the plaintiff and the first defendant, the demand for the outstanding sum made on the defendants, the failure on the part of the defendants to pay the outstanding sum of RM4,825,900.63 and the plaintiff set out the existence and effect of the conclusive evidence clause, stated that based on the facts and evidence set out above the debt was still due and owing and the deponent verily stated that the defendants have no defence on the merits in the action and have raised no triable issues.

[22] I find that the plaintiff has complied with O 14 r 2 of the ROC 2012 and has duly verified its cause of action against the defendants. Pursuant to the *National Company for Foreign Trade* case, the burden is on the defendants to raise a triable issue.

[23] The defendants raised three issues.

[24] The first issue is that the plaintiff has breached its duty of care to the defendants. In respect of this issue, the defendants say that there is a doubt as to what the true nature of the loan granted to the first defendant was. The plaintiff in its affidavit in support of the application has referred to a fixed assets loan whereas the facility agreement exhibited only identified it as a loan facility.

[25] There is no substance to this allegation. In the schedule to the facility agreement, the loan facility amount is stated as 'Loan Facility for Fixed Assets in the sum of RM3,870,000 only to be disbursed from Tabung Japanese Bank International Cooperation'. So the plaintiff is not wrong to refer to the facility as a fixed assets loan. This is not a triable issue.

[26] The defendants allege that the plaintiff had time and again failed to furnish the statements of account regularly to the defendants despite the defendants' request. The plaintiff has denied this and said that it has furnished statements of account whenever requested by the first defendant and the emails exhibited show that the statements of account have been furnished to the first defendant when the plaintiff was requested to forward them. This is not a current account where statements of account should be sent monthly. The plaintiff also pointed out that the defendants have in fact exhibited the statement of account from 1 January 2016–28 February 2017 which proves that the plaintiff had in fact provided the statements of account at the material time.

[27] This allegation raised by the defendants is without basis. The plaintiff has provided statements of account whenever requested by the first defendant.

A **[28]** The defendants referred to an occasion when on 31 March 2016, the first defendant requested the plaintiff for the bank statements and a redemption statement for review by prospective investors who were interested to purchase the units of shop office. The plaintiff only supplied the statements and redemption statement on 20 April 2016 by which time, the defendants allege, the investors had lost interest, thus causing extreme losses to the defendants.

[29] The documents before me do not show that the first defendant had impressed on the plaintiff any urgency in its request and I find that the response of the plaintiff was not inordinately delayed. In any event, there is no evidence of loss or prejudice suffered by the defendants due to this incident.

[30] The defendants exhibited a memorandum of understanding between Primanora Medical Centre Sdn Bhd and Healthscope Ltd dated 4 July but the year is unclear and cannot be made out. The plaintiff has already been informed vide letter from the defendants that the project with Healthscope was halted due to the change in the board of directors. There is no evidence linking this memorandum of understanding to the incident.

[31] There is a confidentiality agreement dated 27 December 2015 between one Hussein Saleh Saeed Alamoudi Group and the second defendant. If the bank statements and redemption statement were required for this agreement, then the defendants had themselves delayed until 31 March 2016 before asking the plaintiff for the statements. They cannot blame the plaintiff, especially when they did not impress upon the plaintiff the urgency of the request.

[32] The defendants also alleged that they were blacklisted by the plaintiff without justification. The plaintiff responded to the effect that the first defendant had failed to pay the instalments with effect from September 2016 and the plaintiff as a financial institution involved in the system of CCRIS reporting is subject to guidelines issued by Bank Negara Malaysia and was obliged to report the information to Bank Negara Malaysia. There is no reply to the plaintiff's affidavit so it is deemed that the defendants have accepted the response of the plaintiff (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281).

[33] I find that this allegation does not raise a triable issue.

[34] The second issue raised by the defendants is that the plaintiff had wrongfully and illegally imposed compound interest and/or penalty charges which the defendants say the plaintiff was not entitled to do under the facility agreement.

[35] This issue is without substance. Section 4.05 of the facility agreement provides for the capitalisation of interest. It therefore entitles the plaintiff to charge compound interest. Section 4.06 of the facility agreement allows the plaintiff to charge interest at a rate which is 1% higher than the prescribed rate if the borrower shall default in the payment on the due date of any one or more of the instalments. The plaintiff contended that it has only charged such interest as is permissible under the facility agreement and the defendants have not proved otherwise. Incidentally, the facility is a conventional facility as shown in the certificate of indebtedness exhibited by the plaintiff. As such, the allegation that the plaintiff is not entitled to charge interest is without basis.

[36] The third issue raised by the defendants relate to the properties under the deeds of assignment. The defendants allege that the plaintiff has failed to disclose to the court as to the current status of the properties and whether strata titles have been issued.

[37] The plaintiff's reply is that if strata titles have been issued, the defendants are obliged to execute National Land Code charges over the properties in favour of the plaintiff but to-date the plaintiff does not know whether strata titles have been issued as no such charges have been executed by the defendants.

[38] This issue is of no substance. The deeds of assignment are only relevant insofar as they should be mentioned as the security for the loan granted to the first defendant. Whether strata titles have been issued or not has nothing to do with the indebtedness of the defendants to the plaintiff in respect of the loan facility.

[39] The last issue raised by the defendants is that there is no cause of action deposed as against the second and third defendants in the plaintiff's affidavits.

[40] This issue is without basis. The plaintiff has deposed that the loan to the first defendant is secured, inter alia, by the guarantee executed by the second and third defendants. The guarantee is exhibited and the plaintiff has in its affidavit in reply set out terms of the guarantee and the second and third defendants' liability thereunder.

[41] In this case, both the facility agreement and the guarantee contained clauses to the effect that a statement of account signed by an officer of the plaintiff showing the indebtedness of the first defendant shall be conclusive and binding on the defendants as to any amount due to the plaintiff.

[42] The plaintiff has exhibited the signed statement of account showing the indebtedness of the first defendant as at 22 August 2017. In the case of

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, the Federal Court held as follows:

> ... whether a certificate of indebtedness issued in accordance with the express provisions of the contract which provide that the certificate is final and conclusive of the matters stated therein, is final and conclusive evidence of the amount in the absence of any manifest error on the certificate ... A certificate of indebtedness operates in the field of adjective law, excusing the plaintiff from adducing the proof of debt and shifting the burden on to the defendant to disprove the amount claimed ... A clause of this nature has been described as a conclusive evidence clause and has been held to be binding and valid by courts in Australia and England ...

[43] Since the defendants' allegation as to the plaintiff's right to impose penalty interest or late payment interest and to compound interest is without basis, the defendants have not succeeded in showing any error in respect of the statement of account.

[44] Where it is a sham defence, in the case of *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 it was held that:

> ... O 14 was intended to put an end to that state of things and to prevent sham defences from defeating the rights of the parties by delay and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

[45] In the circumstances, after considering the affidavits filed by the parties and the submissions of the parties, I find that the defendants have not raised any triable issue which will merit a trial. I accordingly allow the plaintiff's application with costs of RM5,000 subject to allocator.

Plaintiff's application allowed with costs of RM5,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar